HARRY BRANDY

v.

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION & ORS.

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, TOOHEY, GAUDRON & McHUGH JJ
F.C. 95/006
23 FEBRUARY 1995

ADMINISTRATIVE LAW : *Consideration of Racial Discrimination Act 1975 - Whether provisions of Part III of Racial Discrimination Act invalid - Determination of question of invalidity reserved to the Full Court by way of case stated.*

The plaintiff and the third defendant were employed by the Aboriginal and Torres Strait Islander Commission (ATSIC) which had taken over the functions of the department of Aboriginal Affairs (the department). The third defendant lodged a complaint, with the first defendant, against ATSIC pursuant to s. 22 of the Racial Discrimination Act 1975 (the Act) alleging verbal abuse and threatening behaviour on the part of the plaintiff against the third defendant. There was further complaint as to the inadequacy of the response of ATSIC and its chief executive officer.

The first defendant held an inquiry and made a determination pursuant to s. 25Z of the Act. The first defendant's determination was then lodged and registered in the New South Wales Registry of the Federal Court.

The plaintiff challenged the provisions of the Act upon which the first defendant purported to act and argued that the said provisions provide for an exercise of judicial power otherwise than in conformity with Ch.III of the Commonwealth Constitution in that the power is exercised by the first defendant which is not a Court established pursuant to s. 71 and constituted in accordance with s. 72 of the constitution.

The respondents contended that the provisions in the Act relating to review of a determination by the Federal Court operate in such a way that a determination, even when registered, does not constitute an exercise of judicial power by the first defendant.

The matter came up before the Full Court of the High Court of Australia by way of case stated and the Court was requested to determine the following question:

> In consequence of the amendments embodied in the Sex Discrimination and other Legislation Amendment Act 1992 and/or the Law and Justice Legislation Amendment Act 1993 as they affect the Racial Discrimination Act 1975 are any, and if so, which of the provisions of Part III of the Racial Discrimination Act invalid?

Held:

Per Mason CJ, Brennan and Toohey JJ:

[1] The fact that the first defendant cannot enforce its own determinations is a strong factor weighing against the characterisation of its powers as judicial; though it must be recognised that this is not an exclusive test of the exercise of judicial power. Because s. 25Z(2) of the Act provides that a determination of the first defendant is "not binding or conclusive between any of the parties to the determination", the holding of an inquiry and the making of a determination under the Act cannot of itself be seen as an exercise of judicial power.

[2] Although many decision-making functions may take their character as an exercise of judicial, executive or legislative power from their legislative setting, the character of the decision-maker and the nature of the decision-making process, some decision-making functions are exclusive and inalienable exercises of judicial power. In the present case, the determinations by the first defendant for the payment of damages by the appellant and ATSIC were made by reference to the application of the pre-existing principles and standards prescribed by the provisions of ss. 9 and 15 of the Act. These determinations become binding on the parties after registration of the determinations in the Federal Court.

[3] However s. 25ZAB of the Act goes beyond providing the machinery for the enforcement of a determination. It purports to give a registered determination effect "as if it were an order made by the Federal Court". A judicial order made by the Federal Court takes effect as an exercise of Commonwealth judicial power, but a determination by the first defendant is neither made nor registered in the exercise of judicial power. An exercise of executive power by the first defendant and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. In the circumstances, s. 25ZAB of the Act purports to prescribe what the constitution does not permit.

[4] The argument, that the review function entrusted to the Federal Court is an exercise of federal judicial power in the form of a grant of original jurisdiction and that, the provisions of the Act which give binding effect to a determination of the first defendant and make it enforceable merely endow the determination with those attributes as incidental to the exercise of judicial power by the Federal Court, is without substance for the simple reason that the determination is registered and becomes enforceable in circumstances where the review procedure is not invoked.

[5] The Act, in providing for registration of a determination of the defendant and its enforcement as if it were an order of the Federal Court, constitutes an exercise of judicial power by the first defendant and the jurisdiction conferred on the Federal Court to review a determination of the first defendant does not provide a sufficient answer to this conclusion. The consequence of this is that so much of the Act as provides for registration and enforcement of a determination is invalid. This also results in the invalidation of the review procedure which is dependent on the existence of a registered determination. It follows that ss. 25ZAC of the Act are invalid. Section 25ZC of the Act must also be declared invalid because it attaches to a procedure which is itself invalid.

Per Deane, Dawson, Gaudron and McHugh JJ:

[1] It is apparent that the first defendant's functions point in many respects to the exercise of judicial power. However, if it were not for the provisions providing for the registration and enforcement of the first defendant's determinations, it would be plain that the first defendant does not exercise judicial power as s. 25Z(2) of the Act provides that the first defendant's determination would not be binding or conclusive between any of the parties and would be unenforceable.

[2] However, the registration provisions, which are compulsory, reverse the situation and the effect of which is to make the determination binding upon the parties and enforceable as an order of the Federal Court. The determination of the first defendant is enforceable under s. 53 of the Federal Court Act and it is not significant that the mechanism for enforcement is provided by the Federal Court.

[3] A registered determination may be subject to review but has effect as an order of the Court from the moment of registration. Although the determination cannot be enforced pending the institution or completion of a review, it remains an order of the Court. Nevertheless the determination continues to remain the determination of the first defendant and in no sense does it become the determination of the Federal Court.

[4] If the registration of a determination of the first defendant cannot be seen as the commencement of proceedings in the original jurisdiction of the Federal Court, then the existence of the review procedure does not bear upon the question whether the determination was made in the exercise of judicial power. That is obvious in the case of a determination for which no review is sought, but it is equally the case where a review is sought. The existence or exercise of a right of appeal from a decision made in the exercise of judicial power does not convert that decision into one of an administrative kind.

[5] Upon a review a party cannot adduce new evidence without leave of the Court. Although the question of whether "new evidence" is the same as fresh evidence is not clear, its exclusion points to a proceeding by way of appeal rather than a proceeding in the original jurisdiction of the Court. In the circumstances the review procedure provided does not support the suggestion that the registration of a determination of the first defendant is a commencement of a fresh proceeding in the Federal Court.

[6] In the circumstances, ss. 25ZAA, 25ZAB and 25ZAC of the Act which combine to make a determination of the first defendant binding, authoritative and enforceable, invalidly purport to invest judicial power in the first defendant.

[Question answered in the affirmative. Sections 25ZAA, 25ZAB, 25ZAC and 25ZC declared invalid].

Cases referred to:
Huddart, Parker & Co. Proprietary Ltd. v. Moorehead [1909] 8 CLR 330 ***(refd)***
Re Cram; ex parte Newcastle Wallsend Coal Co. Pty. Ltd.[1987] 163 CLR 140 ***(refd)***
Rola Co. (Australia) Pty. Ltd. v. The Commonwealth [1944] 69 CLR 185 ***(refd)***
Shell Co. of Australia v. Federal Commissioner of Taxation [1931] AC 275 ***(refd)***
Precision Data Holdings Ltd. v. Wills [1991] 173 CLR 167 ***(refd)***
Reg. v. Davison [1954] 90 CLR 353 ***(refd)***
Aldridge v. Booth [1988] 80 ALR 1 ***(refd)***
Re Ranger Uranium Mines Pty. Ltd.; ex parte Federated Miscellaneous Workers' Union of Australia [1987] 163 CLR 656 ***(refd)***
Federal Commissioner of Taxation v. Munro [1926] 38 CLR 153 ***(refd)***
Prentis v. Atlantic Coast Line [1908] 211 US 210 ***(refd)***
Re Brindle; ex parte F.B. & F.A. McMahon Pty. Ltd. [1992] 108 ALR 470 ***(refd)***
Re Greenhill; ex parte Pook [1988] 83 ALR 295 ***(refd)***
Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty. Ltd. [1959] 101 CLR 652 ***(refd)***
Harris v. Caladine [1991] 172 CLR 84 ***(refd)***
Builder Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd. [1976] 135 CLR 616 ***(refd)***
Maynard v. Neilson [1988] EOC 92-226 ***(refd)***
Waterside Workers' Federation of Australia v. JW Alexander Ltd. [1918] 25 CLR 434 ***(refd)***
Reg. v. Gallagher; ex parte Aberdare Collieries [1963] 37 ALJR 40 ***(refd)***
Victorian Chamber of Manufacturers v. The Commonwealth (Industrial Lighting Regulations) [1943] 67 CLR 413 ***(refd)***

Legislation referred to:
Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)
Commonwealth Constitution, s. 71, 72
Family Law Act 1975 (Cth)

Family Law Rules, O. 36A r. 7(4)
Federal Court of Australia Act 1976 (Cth), s. 53,(2)
Federal Court Rules, O. 11 r. 23
Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986 (Cth), ss. 8(1), (4), (8)
Judiciary Act 1903 (Cth), s. 18
Law and Justice Legislation Amendment Act 1993 (Cth), s. 18(2)
Local Courts (Civil Claims) Act 1970 (NSW), s. 58
Racial Discrimination Act 1975 (Cth), ss. 9, 9(1), 11, 12, 13, 14, 15, 16, 17, 20(a), 22, 24(1), (2), (3), 4(a), (5), 5(A), 24F, 25, 25A, 25B, 25B(1), 25ZA(1), (2), 25ZAA(1), (2), (3), (4), 25ZAB(1), (3), (4), (5), (6), (7), (11), 25ZAC(2), (4), (5), (6), 25ZC, 25ZI, 30(1)
Sex Discrimination Act 1984
Sex Discrimination and Other Legislation Amendment Act 1992
Trade Marks Act 1905 (Cth), s. 45

Other source referred to:
Commonwealth, House of Representatives Parliamentary Debates (Hansard) 3 November 1992, at p. 2397

For the plaintiff - G.C. Corr (A.F. Twomey with him); Aboriginal Legal Service Limited
For the third defendant - M.J. Higgins; Higgins Solicitors
For the intervener - G. Griffith, QC; Solicitor General for the Commonwealth

JUDGMENT

Mason CJ, Brennan and Toohey JJ:

This matter came before the Court by way of a case stated by Gaudron J which reserved to the Full Court the determination of the following question:

> Are any and which parts of ss. 25ZAA, 25ZAB and 25ZAC of the Racial Discrimination Act 1975 (Cth) invalid on the ground of inconsistency with Chapter III of the Constitution?

As the argument developed, it became clear that an answer to the question asked would not resolve all the matters in issue. Accordingly the parties were directed to approach Gaudron J with a view to securing an amendment to the case stated. This was done and the Court is now asked to determine the following question:

> In consequence of the amendments embodied in the Sex Discrimination and other Legislation Amendment Act 1992 and/or the Law and Justice Legislation Amendment Act 1993 as they affect the Racial Discrimination Act 1975 are any, and if so which, of the provisions of Part III of the Racial Discrimination Act invalid?

Both the Sex Discrimination and Other Legislation Amendment Act and the Law and Justice Legislation Amendment Act effected relevant amendments to the Racial Discrimination Act 1975 (Cth) ("the Act"). The Act is to be read accordingly.

The plaintiff, Harry Brandy, is an officer of the Aboriginal and Torres Strait Islander Commission ("ATSIC"), a body established on 5 March 1990 by the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth). ATSIC took over the functions of the Department of Aboriginal Affairs ("the Department") which then ceased to exist. The third defendant, John Bell, is also an officer of ATSIC. He and the plaintiff were officers of the Department until that body ceased to exist.

On 13 March 1990 the third defendant lodged a complaint against ATSIC with the first defendant, the Human Rights and Equal Opportunity Commission ("the Commission"), pursuant to s. 22 of the Act. The complaint alleged verbal abuse and threatening behaviour

on the part of the plaintiff against the third defendant while both were officers of the Department. There was a further complaint as to the inadequacy of the response of ATSIC and its chief executive officer. The complaint alleged breaches of ss. 9 and 15 of the Act.

The Human Rights and Equal Opportunity Commission

The Commission was established by the Human Rights and Equal Opportunity Commission Act 1986 (Cth). Section 8(1) of that Act identifies the constitution of the Commission as consisting of:

(a) a President; and

(b) a Human Rights Commissioner; and

(c) the Race Discrimination Commissioner; and

(ca) the Aboriginal and Torres Strait Islander Social Justice Commissioner; and

(d) the Sex Discrimination Commissioner;

(e) the Privacy Commissioner; and

(f) the Disability Discrimination Commissioner.

Section 8(4) requires that the Human Rights Commissioner be a legally qualified person appointed as a full-time member (s. 8(8) defines "legally qualified person) but otherwise no particular qualifications are required of those who constitute the Commission.

The Racial Discrimination Act deals with the appointment of the Race Discrimination Commissioner ("the Commissioner") and provides that the Commissioner holds office for such period, not exceeding seven years, as is specified in the instrument of appointment, but is eligible for re-appointment (s. 30(1)).

Part II of the Act is headed "Prohibition of Racial Discrimination". Part II contains ss. 9 and 15, breaches of which were alleged in the third defendant's complaint. Sections 9 and 15 make conduct of the kind described in either section unlawful. A complaint in writing that a person has done an act that is unlawful by virtue of a provision of Pt II may be lodged with the Commission (s. 22). Where a complaint is so lodged or it appears to the Commission that a person has done an act that is unlawful by virtue of a provision of Pt II, the Commission shall notify the Commissioner accordingly (s. 24). The Commissioner is then required to inquire into the act unless, for the reasons specified, the Commissioner decides not to commence or continue the inquiry (s. 24(1) and (2)). In that event, the Commissioner is obliged to give notice to the complainant (s. 24(3)), who may require the Commissioner to refer the complaint to the Commission or to the President (s. 24(4), (5), (5A)).

Part III of the Act is headed "Inquiries and Civil Proceedings". The Commission is obliged to hold an inquiry into each complaint referred to it by the Commissioner or any matter referred to it by the Minister for inquiry as a complaint under Pt III (s. 25A). The powers of the Commission to hold an inquiry under the Act may, if the President so directs, be exercised by a single member of the Commission who is legally qualified, or by two or more members of the Commission at least one of whom is legally qualified (s. 25B(1)). In that event, the Commission's powers with respect to a final determination are governed by (s. 25Z) which reads in part:

(1) After holding an inquiry, the Commission may:

(a) dismiss the complaint the subject of the inquiry; or

(b) find the complaint substantiated and make a determination, which may include any one or more of the following:

(i) a declaration that the respondent has engaged in conduct rendered unlawful by this Act and should not repeat or continue such unlawful conduct;

(ii) a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;

(iii) a declaration that the respondent should employ or re-employ the complainant;

(iv) a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the conduct of the respondent;

(v) a declaration that the respondent should promote the complainant;

(vi) a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by the complainant;

(vii) a declaration that it would be inappropriate for any further action to be taken in the matter.

(2) A determination of the Commission under sub-section (1) is not binding or conclusive between any of the parties to the determination.

Where a determination has been made under s. 25Z, the Commission is required as soon as practicable after the determination is made to "lodge the determination in a Registry of the Federal Court" and thereupon the Registrar is required to register the determination (s. 25ZAA(2) and (3)). The Commission must, within seven days, give written notice of the registration to the complainant and respondent (s. 25ZAA(4)). It should be noted that s. 25ZAA has no application where the respondent is a Commonwealth agency or is the principal executive of a Commonwealth agency (s. 25ZAA(1)). The Parliament apparently assumed that in those cases the determination will be met, so far as the Commonwealth is concerned, without the need for registration. Nevertheless, Div. 4 of Pt III of the Act - Review and enforcement of determinations involving Commonwealth agencies - contains provisions aimed at ensuring that a Commonwealth agency or the principal executive of an agency complies with a determination under s. 25Z. The ultimate sanction for non-compliance is an application to the Federal Court for an order directing the agency or principal executive to comply with a determination (s. 25ZI).

Consequences of registration of a determination

Upon registration in the Federal Court, the determination, which hitherto has not been binding or conclusive between the parties (s. 25Z(2)), has effect as if it were an order made by the Federal Court (s. 25ZAB(1)). However, no action to enforce the determination may be taken before the end of the "normal application and review period" and a failure by a respondent, during that period, to comply with a positive requirement of a determination is not a contravention of the determination (s. 25ZAB(3) and (4)). The expression normal application and review period is defined (s. 25ZAB(11)). The period is 28 days from registration of the determination or, if the respondent seeks a review of the determination, when proceedings on the review are completed or otherwise terminated. The respondent to a determination may, within 28 days after the determination is registered, apply to the Federal Court for such a review (s. 25ZAB(5) and (6)). The Court may extend the time for applications "only in exceptional circumstances" (s. 25ZAB(7)). It is only the respondent who may seek a review. Thus, if the Commission determined, pursuant to s. 25Z(1)(b)(vii), that it would be

inappropriate for any further action to be taken in the matter, the complainant would not be entitled to invoke the review procedure and that would be the end of the matter so far as the Act is concerned.

The parties to a review are the applicant and the complainant to the determination (s. 25ZAC(2)). The Court "may review all issues of fact and law" (s. 25ZAC(4)). A party "cannot adduce new evidence without the leave of the Court" s. 25ZAC(5). After reviewing the determination, the Court "may make such orders as it thinks fit (including a declaration of right)"; the orders may confirm a determination that is registered under s. 25ZAA (s. 25ZAC(6)).

The complaint

The complaint made by the third defendant against the plaintiff alleged breaches of ss. 9 and 15 of the Act. It is unnecessary to set out these sections in full. Section 9(1) makes it unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in any field of public life. Section 15 contains a number of prohibitions on employers or persons acting on their behalf in respect of acts relating to the non-employment, treatment and dismissal of a person by reason of his or her race, colour, or national or ethnic origin. The third defendant gave notice in accordance with s. 24(4)(a) of the Act and accordingly the Commissioner referred the complaint to the Commission.

The power of the Commission to hold an inquiry under the Act into the third defendant's allegations was exercised by Mr. Castan QC, the second defendant. The second defendant was appointed pursuant to s. 24F of the Act which empowers the Minister to appoint a person to participate, in accordance with the section, "in the performance of the functions of the Commission". He conducted an inquiry and, on 22 December 1993, made a determination pursuant to s. 25Z of the Act. The determination took effect as a determination of the Commission. By that determination the second defendant found the third defendant's complaint substantiated and declared that the following acts or courses of conduct should be performed:

(1) that the plaintiff do apologise to the third defendant, the form of the apology being annexed to the determination;

(2) that the plaintiff do pay the sum of $2,500 to the third defendant by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by the third defendant;

(3) that ATSIC do take disciplinary action against the plaintiff, in relation to the conduct which he perpetrated against the third defendant;

(4) that ATSIC do apologise to the third defendant in relation to the handling of his complaint, the form of the apology being annexed to the determination;

(5) that ATSIC do pay the sum of $10,000 to the third defendant by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by the third defendant.

On 23 December 1993 the Commission lodged the determination in the New South Wales Registry of the Federal Court and the determination was registered that day. On 20 January 1994 the plaintiff, having received notice of registration, applied to the Federal Court, pursuant

to s. 25ZAB(5) of the Act, for a review of the determination. That application has proceeded no further pending a decision on the plaintiff's challenge to the validity of sections of the Act.

The plaintiffs challenge to the Act

The plaintiff's challenge to particular provisions of the Act is based upon the proposition that they provide for an exercise of judicial power otherwise than in conformity with Ch. III of the Commonwealth Constitution in that the power is exercised by the Commission which is not a Court established pursuant to s. 71 and constituted in accordance with s. 72 of the Constitution. The plaintiff further argues that the correctness of this proposition is not affected by the provisions for review by the Federal Court.

To determine this argument it is first necessary to consider the relevant steps in the operations of the Commission. In doing so, it is also necessary to bear in mind that, in the words of Griffith CJ in *Huddart, Parker & Co. Proprietary Ltd. v. Moorehead* [1909] 8 CLR 330 at 357. (See also *Re Cram*; *ex parte Newcastle Wallsend Coal Co. Pty. Ltd.* [1987] 163 CLR 140 at pp. 148-149, and the authorities referred to therein):

> [t]he exercise of [judicial] power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

The exercise of power by a tribunal to enforce its own orders has sometimes been seen as an essential element in the exercise of judicial power. In *Rola Co. (Australia) Pty. Ltd. v. The Commonwealth* [1944] 69 CLR 185 at p. 199, Latham CJ, with reference to Griffith CJ's definition of judicial power in *Huddart, Parker*, said:

> If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then, according to the definition quoted, all the attributes of judicial power are plainly present. I refer to what I say more in detail hereafter, that the Privy Council, in the *Shell* case [1931] AC 275 ... expressly held that a tribunal was not necessarily a Court because it gave decisions (even final decisions) between contending parties which affected their rights.

In *Rola Co.* [1944] 69 CLR at p. 200, it was the absence of any power in the Committee of Reference to enforce its own determination that led Latham CJ (with whom McTiernan J agreed) to conclude that the Committee did not exercise judicial power. And, in *Shell Co. of Australia v. Federal Commissioner of Taxation* [1931] AC 275 at 297, the Privy Council held that a tribunal is not necessarily a Court in the strict sense of exercising judicial power because it gives a final decision; nor because two or more contending parties appear before it between whom it has to decide; nor because it gives decisions which affect the rights of subjects; nor because it is a body to which a matter is referred by another body.

However, it has not been found possible to offer an exhaustive definition of judicial power (*Precision Data Holdings Ltd. v. Wills* [1991] 173 CLR 167 at pp. 188-189). So, in *Reg. v. Davison* [1954] 90 CLR 353 at 368, Dixon CJ and McTiernan J observed:

> [T]he enforcement of a judgment or judicial decree by the Court itself cannot be a necessary attribute of a Court exercising judicial power. The power to award execution might not belong to a tribunal, and yet its determinations might clearly amount to an exercise of the judicial power. Indeed it may be said that an order of a Court of petty sessions for the payment of money is an example. For warrants for the execution of such an order are granted by a justice of the peace as an independent administrative act.

The fact that the Commission cannot enforce its own determinations is a strong factor weighing against the characterization of its powers as judicial; though it must be recognized that this is not an exclusive test of the exercise of judicial power.

The plaintiff's challenge only impugned the registration and enforcement procedure of the Act. Section 25Z, which empowers the Commission to make determinations, was only put in issue to the extent that it supported the procedure overall. Because s. 25Z(2) provides that a determination of the Commission is "not binding or conclusive between any of the parties to the determination", the holding of an inquiry and the making of a determination under the Act cannot of itself be seen as an exercise of judicial power (see *Aldridge v. Booth* [1988] 80 ALR 1 at p. 6). In that regard, where the Commission finds a complaint to have been substantiated, the Commission is confined to making a declaration (which is not binding or conclusive) qualified in terms of what the respondent "should" do rather than in terms of what the respondent "shall" or "must" do.

At one point, the plaintiff placed some reliance on the following passage from *Re Ranger Uranium Mines Pty. Ltd.; ex parte Federated Miscellaneous Workers' Union of Australia* [1987] 163 CLR 656 at p. 666, in support of an argument that a determination by the Commission may of itself constitute an exercise of judicial power:

> The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations.

But this passage must be taken in context and, in particular, read with what follows shortly thereafter:

> As was pointed out in *Re Cram; ex parte Newcastle Wallsend Coal Co. Pty. Ltd.* [1987] 163 CLR at p. 149, the formation of an opinion as to legal rights and obligations does not involve the exercise of judicial power, at least if it is 'a step in arriving at the ultimate conclusions on which [is based] the making of an award intended to regulate the future rights of the parties'. For, as was there made clear, 'the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights'.

In the end, the plaintiff did not attack s. 25Z except in so far as it was part of the procedure for registration and enforcement.

Although many decision-making functions may take their character as an exercise of judicial, executive or legislative power from their legislative setting, the character of the decision-maker and the nature of the decision-making process, some decision-making functions are exclusive and inalienable exercises of judicial power (*Reg. v. Davison* [1954] 90 CLR at pp. 368-370 per Dixon CJ and McTiernan J). As Dixon CJ and McTiernan J observed in *Reg. v. Davison* (*ibid.* at 369):

> The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a Court constituted under ss. 71 and 72 of the Constitution.

In that statement, the expression "judicial determination" means an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found.

Thus, it has always been accepted that the punishment of criminal offences and the trial of actions for breach of contract and for wrongs are inalienable exercises of judicial power (*Federal Commissioner of Taxation v. Munro* [1926] 38 CLR 153 at p. 175, per Isaacs J). The validity of that proposition rests not only on history and precedent but also on the principle

that the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties (*Reg. v. Davison* [1954] 90 CLR at pp. 368-370, per Dixon CJ and McTiernan J). So, when A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a Court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power. The determination involves an exercise of such power not simply because it is made by a Court but because the determination is made by reference to the application of principles and standards "supposed already to exist" (*Prentis v. Atlantic Coast Line* [1908] 211 US 210 at p. 226, per Holmes J). And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability of B to pay A the sum in question (see *Rola Co.* [1944] 69 CLR at p. 199, per Latham CJ). Consequently, even if the determination in such a case were to be made by an administrative tribunal and not by a Court, the determination would constitute an exercise of judicial power, although not one in conformity with Ch.III of the Constitution.

In the present case, the determinations by the Commission for the payment of damages by the appellant and ATSIC were made by reference to the application of the pre-existing principles and standards prescribed by the provisions of ss. 9 and 15 of the Act. Accordingly, the only distinction between the determination supposed in the last sentence of the preceding paragraph and the determinations by the Commission in the present case is that the Commission's determinations only become binding on the parties and enforceable after registration of the determinations in the Federal Court. Upon registration they become binding on the parties and have effect as if they were an order of the Federal Court. However, the determinations cannot be enforced until the expiration of the normal application and review period.

If the respondent to a determination does not apply for a review within 28 days of the registration of the determination, then the determination is enforceable at the expiration of that time unless leave to apply is granted after that time by the Federal Court. And, if the Commission finds the complaint substantiated and yet declares under s. 25Z(1)(b)(vii) that it would be inappropriate for any further action to be taken in the matter, the determination is binding and enforceable upon registration in the Federal Court because a successful complainant is given no right to invoke the review procedure.

Turning to the case before the Court, whatever might be the enforceability of a declaration that the plaintiff "do apologise", a declaration that the plaintiff "do pay the sum of $2,500" to the third defendant, once registered, attracts the operation of s. 53 of the Federal Court of Australia Act 1976 (Cth). By that section, a person in whose favour a judgment is given is entitled to the same remedies for enforcement, by execution or otherwise, as are allowed by the laws of the State or Territory applicable. In the present case, this means New South Wales. Section 53 does not affect the operation of any provision made by or under any other Act or the Rules of Court for the execution and enforcement of judgments of the Court (s. 53(2)).

But s. 25ZAB goes beyond providing the machinery for the enforcement of a determination. It purports to give a registered determination effect "as if it were an order made by the Federal Court". A judicial order made by the Federal Court takes effect as an exercise of Commonwealth judicial power, but a determination by the Commission is neither made nor registered in the exercise of judicial power. An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an

order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. Thus, s. 25ZAB purports to prescribe what the Constitution does not permit.

The Commonwealth submits, however, that the provisions relating to review of a determination by the Federal Court operate in such a way that a determination, even when registered, does not constitute an exercise of judicial power by the Commission. This submission, which was put at the forefront of the Commonwealth's argument, should be considered in the context of the interlocking provisions relating to inquiries and to review and enforcement of determinations (that is, Divs 3 and 4 of Pt III of the Act).

Previous procedures under the Act

The system of review of a determination by the Federal Court was introduced as part of the amendments made by the Sex Discrimination and other Legislation Amendment Act. Some further changes were made by the Law and Justice Legislation Amendment Act. However, before turning to this system of review, it is useful to compare the relevant provisions of the Act before the system was introduced. When first enacted, the Act contained ss. 9 and 15, though not entirely in their present form. There was a Commissioner for Community Relations whose functions were, *inter alia*, inquiring into alleged infringements of Pt II and endeavouring to effect a settlement of the matters alleged to constitute those infringements (s. 20(a)). However, a person aggrieved by an act considered to have been unlawful by reason of Pt II was entitled to "initiate a proceeding in relation to the act by way of civil action in a Court of competent jurisdiction" (s. 24(1)) and the Court was empowered to grant various remedies, including injunctive relief (of a negative or mandatory nature), cancellation or variation of a contract and damages (s. 25). Clearly, in those circumstances, the function of the Commissioner was administrative only.

The Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986 (Cth) repealed Pt III of the Act - Inquiries and Civil Proceedings - and substituted a new part under the same heading. A Race Discrimination Commissioner was given the functions previously exercised by the Commission for Community Relations. Provision was made for inquiries by the Commission and the making of determinations. The Commission or a complainant was empowered to institute a proceeding in the Federal Court to enforce a determination. Where the Court was satisfied that the respondent had engaged in conduct or committed an act that was unlawful under the Act, the Court was authorized to make such orders (including a declaration of right) as it thought fit. Thus, an independent exercise of judicial power by the Federal Court was required to give effect to a determination.

Review by the Federal Court

The Commonwealth, as intervener, argued that, although styled as a review, the procedure set out in s. 25ZAC "is obviously an exercise of original jurisdiction" because the Federal Court may review all issues of fact and law and may make such orders as it thinks fit. The argument continued: registration of a determination under s. 25ZAA is the first step in the judicial process established by ss. 25ZAB and 25ZAC. It is like the filing of an originating process.

In considering the nature of the "review" contemplated by s. 25ZAC, it is relevant to note that the expression "review" is commonly used in the context of judicial control of administrative action and in the context of comprehensive administrative review by an administrative tribunal of administrative decisions (*Re Brindle; ex parte F.B. & F.A. McMahon*

Pty. Ltd. [1992] 108 ALR 470 at p. 473, per Hill J). But what emerges from the judicial decisions and, for that matter, from statutes is that "review" has no settled pre-determined meaning; it takes its meaning from the context in which it appears.

It might be said that the use of the word "review" is apt to signify that the decision under review is administrative in character rather than one made in the exercise of the judicial power of the Commonwealth (*Re Greenhill; ex parte Pook* [1988] 83 ALR 295 at p. 296, per Gummow J), though, in the context of the review of a decision of the Registrar of Trade Marks by the High Court, the word "appeal" was used in s. 45 of the Trade Marks Act 1905 (Cth) (*Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty. Ltd.* [1959] 101 CLR 652 at pp. 656, 657, per Dixon CJ). And it is possible that those who drafted s. 25ZAC considered that the Commission's functions did not involve an exercise of judicial power.

The Commonwealth contends that the review function entrusted to the Federal Court is an exercise of federal judicial power in the form of a grant of original jurisdiction (*ibid.* at p. 657, per Dixon CJ). It is in that context that the Commonwealth argues that the provisions of the Act which give binding effect to a determination of the commission and make it unforceable merely endow the determination with those attributes as incidental to the exercise of judicial power by the Federal Court. That argument is without substance for the simple reason that the determination is registered and becomes enforceable in circumstances where the review procedure is not invoked.

An endeavour was made to support the argument by reference to a supposed analogy with a default judgment. But default judgments are entered in the exercise of judicial power by a Court, pursuant to its rules, and may be set aside in accordance with those rules. Non-compliance with those rules is the occasion for the entry of a default judgment. So any comparison with a default judgment is at best tenuous.

In exercising its jurisdiction to review a determination by the Commission, the starting point is the existence of a determination and the evidence given to the Commission in the inquiry which led to the making of the determination. The Federal Court must start with this material; indeed, unless the Court gives leave to adduce new evidence, that will be the only material before the Court. It is true that the Court is empowered to review all issues of fact and law. That, we think, is a facultative provision; whether the Court does review all issues of fact and law will be a matter for it in the light of the arguments put to it. Whether it is incumbent on a respondent to give grounds or the like for a review is something on which the Act is silent. This may well be deliberate, in order to avoid argument that the review is by way of appeal. At the same time, the Court does have the determination and the evidence before the Commission and it is clear that the Court must have regard to that material.

This is in marked contrast to O. 36A r. 7(4) of the Family Law Rules which was considered in *Harris v. Caladine* [1991] 172 CLR 84. The sub-rule reads:

> A Court reviewing an exercise of power by a Judicial Registrar or a Registrar shall proceed by way of a hearing *de novo* but may have regard to the proceedings, including the evidence given and any affidavit filed, before the Judicial Registrar or Registrar, as the case requires.

Harris v. Caladine concerned a delegation of judicial power by a Court constituted in accordance with Ch. III of the Constitution. By reason of the nature of the review provided by the Family Law Rules and other aspects of the Family Law Act 1975 (Cth) and the Rules, the delegation was held not to infringe Ch. III. But the provisions of the Act with which the Court is presently concerned are so different as to preclude the decision from being of direct relevance.

In assessing the nature of the review procedure in the Act, s. 25ZAC(5) is of importance. It reads:

> A party cannot adduce new evidence without the leave of the Court.

The expression "new evidence" is, we think, unusual. Expressions such as fresh evidence and further evidence have well-understood meanings. But not so "new evidence". Does it mean evidence about matters on which no evidence was led before the Commission and which is therefore new in that sense? Or does it mean that the parties may give evidence confined to what was said before the Commission? The latter seems unlikely since it would be merely repetitive. Furthermore, it will preclude cross-examination (assuming cross-examination to be available), aimed at bringing out facts which were not before the Commission.

Again, by way of contrast, reference may be made to *Aldridge v. Booth* [1988] 80 ALR 1, where Spender J considered the role of the Federal Court in the Sex Discrimination Act 1984 (Cth) as it stood at the relevant time. Proceedings to enforce a determination of the Commission could be brought in the Federal Court. The Court was required to be "satisfied" that the respondent had engaged in conduct or committed an act that was unlawful under the Act. In that context, Spender J said (*ibid*. at pp. 7-8):

> How matters of fact are established to the satisfaction of the Court will depend upon the nature of the case but where, as here, the dispute requires an assessment of the credibility of the parties and their witnesses, it seems to me impossible to avoid the conclusion that those issues must be determined on the basis of oral evidence.

But that statutory context is quite different from the one with which we are concerned. The Act says nothing as to the satisfaction of the Federal Court, simply that the Court may review all issues of fact and law and make such orders as it thinks fit.

The review to which ss. 25ZAB and 25ZAC refer is not a hearing *de novo*. Such a hearing requires that "the informant or complainant starts again and has to make out his case and call his witnesses" (*Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd.* [1976] 135 CLR 616 at p. 620; see also *Harris v. Caladine* [1991] 172 CLR at p. 124).

Not only is there in these sections an absence of language indicating a fresh hearing, the legislative history points in a different direction. In *Maynard v. Neilson* [1988] EOC 92-226, Wilcox J referred to difficulties under the existing system of enforcement under the Act. His Honour spoke of the considerable costs of duplicating the hearing and of the danger that, in the context of a non-binding determination, a party might fail to put forward all relevant evidence. He also said that the standing of the Commission was not enhanced by a procedure which enabled the parties to disregard its determinations and to resist enforcement by the presentation of evidence withheld from the Commission.

In the course of introducing the amendments to the Act through the Sex Discrimination and other Legislation Amendment Act, the Prime Minister made express reference to the remarks of Wilcox J to which we have just referred, (Commonwealth, House of Representatives, Parliamentary Debates (Hansard), 3 November 1992 at p. 2397). It is clear that the intention of the Parliament was to avoid these criticisms. The Parliament did so by introducing a scheme whereby the Federal Court would review, in the sense of re-examine, a determination in light of the evidence adduced before the Commission. In light of that evidence and any new evidence the Court permits to be led, the Court may make such orders as it thinks fit. In that way a duplicate hearing is avoided and a party who chooses not to lead all relevant evidence before the Commission is at risk that no further evidence will be allowed.

The Court may review issues of fact, though, ordinarily, one would expect its attention to focus more on issues of law, particularly if it has not allowed new evidence. And one would expect that, in reviewing issues of fact, and of law, the Court will inquire why the determination should not stand. After all, if nothing is offered by the respondent to suggest that the determination is in error, why should it not stand?

The Federal Court is expressly empowered to confirm a determination though that express power hardly seems necessary given the wide powers the Court otherwise has. The Court is not expressly empowered to set aside a determination but such a power must be implied because, unless the Court does so, the determination stands as an order of the Court.

Conclusion

It follows from what has been said in these reasons that the Act, in providing for registration of a determination of the Commission and its enforcement as if it were an order of the Federal Court, constitutes an exercise of judicial power by the Commission and that the jurisdiction conferred on the Federal Court to review a determination of the Commission does not provide a sufficient answer to this conclusion.

The consequence is that so much of the Act as provides for registration and enforcement of a determination is invalid. This must result in the invalidation of the review procedure which is dependent on the existence of a registered determination. It follows that ss. 25ZAB and 25ZAC are invalid. Section 25ZC must also be declared invalid because it attaches to a procedure which, in our view, is itself invalid.

Deane, Dawson, Gaudron and McHugh JJ:

Under Pt II of the Racial Discrimination Act 1975 (Cth) ("the Act") various acts of racial discrimination are made unlawful (ss. 9, 11, 12, 13, 14, 16 and 17). A complaint may be lodged with the Human Rights and Equal Opportunity Commission ("the Commission") that a person has done an act that is unlawful by virtue of a provision of Pt II (s. 22). Procedures are laid down for the settlement or summary disposal of a matter arising out of a complaint (see Div. 2, Pt III of the Act), but failing that, the Commission is required to hold an inquiry and dispose of it. Under s. 25Z(1) of the Act the Commission may determine the matter by making various declarations, including a declaration that the respondent has engaged in conduct rendered unlawful by the Act, a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant and a declaration that the respondent should pay to complainant damages by way of compensation for any loss or damage suffered by reason of the conduct of the respondent. Under s. 25Z(2) a determination under sub-section (1) is not binding or conclusive between any of the parties to the determination.

As soon as practicable after a determination is made, the Commission must lodge it in a Registry of the Federal Court and upon lodgment the Registrar must register the determination (s. 25ZAA(2) and (3)). There is an exception where the respondent is a Commonwealth agency or the principal executive of a Commonwealth agency (s. 25ZAA(1)). Upon registration of a determination, it has effect as if it were an order made by the Federal Court, but the respondent may apply to the Federal Court for a review of the determination (s. 25ZAB(1) and (5)). No action may be taken to enforce the determination before the expiration of the time for making an application for review, which, in the case of a determination made before 18 January 1994, is a period of 28 days from the registration of the determination or, if a review is instituted within that time, a period ending upon the completion of the review (s. 25ZAB(3), (5), (6) and (7). And see s. 18(2) of the Law and Justice Legislation Amendment Act 1993 (Cth)).

Under s. 25ZAC the Court may, in reviewing the determination, review all issues of fact and law and make such orders as it thinks fit, including a declaration of right. However, a party cannot adduce "new evidence" without the leave of the Court.

The third defendant, John Bell, and the plaintiff, Harry Brandy, were employed as officers of the Department of Aboriginal Affairs and the Aboriginal and Torres Strait Islander Commission ("ATSIC"). The Department of Aboriginal Affairs was superseded by ATSIC in 1990. Mr. Bell lodged a complaint with the Commission that Mr. Brandy and their employer, ATSIC, had done acts which were unlawful under ss. 9 and 15 of the Act. The second defendant, Mr. Castan QC, who constituted the Commission under ss. 24F and 25B of the Act for the purpose, held an inquiry and made a determination in which he found the complaint substantiated. He declared that the following acts or course of conduct should be performed:

(1) that the plaintiff do apologise to the third defendant, the form of the apology being annexed to the determination;

(2) that the plaintiff do pay the sum of $2,500 to the third defendant by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by the third defendant;

(3) that ATSIC do take disciplinary action against the plaintiff, in relation to the conduct which he perpetrated against the third defendant;

(4) that ATSIC do apologise to the third defendant in relation to the handing of his complaint, the form of the apology being annexed to the determination;

(5) that ATSIC do pay the sum of $10,000 to the third defendant by way of damages for the pain, humiliation, distress and loss of personal dignity suffered by the third defendant.

On 23 December 1993, the Commission lodged the determination in a Registry of the Federal Court and it was registered on the same day. On 20 January 1994, the plaintiff applied to the Federal Court for a review of the Commission's determination. He also commenced proceedings in this Court claiming that those sections of the Act which provide for the registration and review of a determination are invalid by reason of the requirements of Ch. III of the Constitution.

Pursuant to s. 18 of the Judiciary Act 1903 (Cth), Gaudron J stated a case and reserved a question for the consideration of the Full Court which, in its amended form, is as follows:

> In consequence of the amendments embodied in the Sex Discrimination and Other Legislation Amendment Act 1992 and/or the Law and Justice Legislation Amendment Act 1993 as they affect the Racial Discrimination Act 1975 are any, and if so which of the provisions of Part III of the Racial Discrimination Act invalid?

Part III of the Racial Discrimination Act is that part which provides for inquiries into complaints, their determination by the Commission and their registration in the Federal Court. Under legislation which was introduced in 1986 Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986 (Cth), the determination of the Commission was not binding or conclusive between any of the parties to the determination (s. 25Z(2)), but the Commission or complainant might institute a proceeding in the Federal Court to enforce a determination (s. 25ZA(1)). Under that legislation, where the Federal Court was satisfied that the respondent had engaged in conduct or committed an act which was unlawful under the Racial Discrimination Act, the Federal Court might make such orders as it thought fit (s. 25ZA(2)). The current provisions of the Act

providing for the registration of a determination of the Commission by the Federal Court were the result of amendment of the Act by the Sex Discrimination and Other Legislation Amendment Act 1992 and the Law and Justice Legislation Amendment Act 1993.

The Commission, notwithstanding that on this occasion it comprised a legally qualified person, is not constituted as a Court in accordance with the requirements of Ch. III of the Constitution. It cannot, therefore, exercise the judicial power of the Commonwealth which, under s. 71, may only be vested in the High Court or such other Courts as the Parliament creates or invests with federal jurisdiction (see *Waterside Workers' Federation of Australia v. JW Alexander Ltd.* [1918] 25 CLR 434). Those Courts must be constituted as provided by s. 72. The plaintiff contends that the amendments to the Act which require the registration of the Commission's determinations in the Federal Court, resulting in their enforceability under s. 53 of the Federal Court of Australia Act 1976 (Cth), are invalid because they purport to invest the Commission with judicial power:

Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a Court, constitute the exercise of judicial power but, when performed by some other body, do not (see *Reg. v. Davison* [1954] 90 CLR 353 at p. 368). These difficulties were recognized by the Court in *Precision Data Holdings Ltd. v. Wills* [1991] 173 CLR 167 at pp. 188-189:

> The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.

One is tempted to say that, in the end, judicial power is the power exercised by Courts and can only be defined by reference to what Courts do and the way in which they do it, rather than by recourse to any other classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.

It is traditional to start with the definition advanced by Griffith CJ in *Huddart, Parker & Co. Proprietary Ltd. v. Moorehead* [1909] 8 CLR 330 at p. 357, in which he spoke of the concept of judicial power in terms of the binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action. However, it is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion. Thus Kitto J in *Reg. v. Gallagher; ex parte Aberdare Collieries* [1963] 37 ALJR 40 at p. 43, said that judicial power consists of the "giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct". But again, as was pointed out in *Re Cram; ex parte Newcastle Wallsend Coal Co. Pty. Ltd.* [1987] 163

CLR 140 at p. 149, the exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and obligations if only as the basis for prescribing future rights and obligations.

However, there is one aspect of judicial power which may serve to characterize a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power. In *Waterside Workers' Federation of Australia v. JW Alexander Ltd.* [1918] 25 CLR at p. 451, Barton J said:

> It is important to observe that the judicial power includes with the decision and the pronouncement of judgment the power to carry that judgment into effect between the contending parties. Whether the power of enforcement is essential to be conferred or not, when it is conferred as part of the whole the judicial power is undeniably complete.

And in *Federal Commissioner of Taxation v. Munro* [1926] 38 CLR 153 at p. 176, Isaacs J pointed out that the concept of judicial power includes enforcement; the capacity to give a decision enforceable by execution. It was this characteristic of judicial power which was emphasized by Latham CJ in *Rola Co. (Australia) Pty. Ltd. v. The Commonwealth* [1944] 69 CLR 185 at pp. 198-199. He pointed to the fact that in *Huddart, Parker & Co. Proprietary Ltd. v. Moorehead* Griffith CJ referred not only to the giving of a binding and authoritative decision as being indicative of the exercise of judicial power, but also spoke of such a decision being given by a tribunal "called upon to take action". Thus, Latham CJ pointed out, where a tribunal is able to give a binding and authoritative decision and is able to take action so as to enforce that decision, "all the attributes of judicial power are plainly present", (*ibid.* at p. 199).

However, notwithstanding the reference by Griffith CJ to a tribunal "called upon to take action", it is not essential to the exercise of judicial power that the tribunal should be called upon to execute its own decision. As Dixon CJ and McTiernan J observed in *Reg. v. Davison* [1954] 90 CLR at p. 368, an order of a Court of petty sessions for the payment of money is made in the exercise of judicial power, but the execution of such an order is by means of a warrant granted by a justice of the peace as an independent administrative act (cf. Local Courts (Civil Claims) Act 1970 (NSW), s. 58).

Turning to the present case, it is apparent that the Commission's functions point in many respects to the exercise of judicial power. It decides controversies between parties and does so by the determination of rights and duties based upon existing facts and the law as set out in Pt II of the Racial Discrimination Act. Indeed, the relevant function of the Commission is essentially to determine whether the provisions of ss. 9 and 15, which prohibit certain kinds of racial discrimination, have been contravened. That is clearly indicative of the exercise of judicial power, for, as Starke J said in *Victorian Chamber of Manufacturers v. The Commonwealth (Industrial Lighting Regulations)* [1943] 67 CLR 413 at p. 422:

> The Constitution remits to the judicial power of the Commonwealth the jurisdiction and authority to determine whether a subject has or has nor contravened a law or regulation of the Commonwealth.

Moreover, the remedies which the Commission may award (see s. 25Z) include damages as well as declaratory or injunctive relief and, according to whether they may be viewed as punitive or otherwise, make its functions closely analogous to those of a Court in deciding criminal or civil cases. And as Isaacs J remarked in *Federal Commissioner of Taxation v. Munro* [1926] 38 CLR at p. 175, the punishment of crime or the trial of actions for breach of contract or for civil wrongs is "appropriate **exclusively** to judicial action".

However, if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power. That is because, under s. 25Z(2), its determination would not be binding or conclusive between any of the parties and would be unenforceable. That situation is, we think, reversed by the registration provisions.

Under s. 25ZAA registration of a determination is compulsory and under s. 25ZAB the automatic effect of registration is, subject to review, to make the determination binding upon the parties and enforceable as an order of the Federal Court. Nothing that the Federal Court does gives a determination the effect of an order. That is done by the legislation operating upon registration. The result is that a determination of the Commission is enforceable by execution under s. 53 of the Federal Court Act. It is the determination of the Commission which is enforceable and it is not significant that the mechanism for enforcement is provided by the Federal Court. The situation stands in contrast to the situation which was superseded by the 1992 amendments to the Racial Discrimination Act. Under the earlier provisions, the Federal Court had to be satisfied of a breach of the Act before making an order for itself.

The Commonwealth, intervening, submitted that by virtue of the review procedure provided by s. 25ZAC the registration of a determination is the commencement of proceedings in the Federal Court so that if a determination becomes enforceable it is by reason of the adjudication of the Federal Court, that being a Court constituted in accordance with Ch. III of the Constitution and capable of exercising judicial power.

The plain answer to that submission is that a registered determination may not be subjected to review but has effect as an order of the Court from the moment of registration. True it is that it cannot be enforced pending the institution or completion of a review, but it remains an order of the Court. The right to review is exercisable only by a respondent to a determination. If he or she fails to apply for review within 28 days, the determination becomes enforceable forthwith. The Commonwealth sought to counter this answer by submitting that the procedure is analogous to the entry of judgment by default, but the analogy cannot be sustained.

A judgment entered by default is nonetheless a judgment of the Court whose rules provide for such a course (see e.g., Federal Court Rules, O. 11 r. 23). The circumstances in which judgment may be entered are prescribed by the Court itself and the process is one which is commenced and brought to a conclusion in accordance with those rules. The circumstances in which a determination may be made by the Commission are prescribed by the Act and, except upon a review, the Federal Court is precluded from any consideration of those circumstances either upon the registration of a determination or in relation to its enforcement. The determination remains the determination of the Commission and in no sense becomes the determination of the Federal Court.

If the registration of a determination of the Commission cannot be seen as the commencement of proceedings in the original jurisdiction of the Federal Court, then the existence of the review procedure does not bear upon the question whether the determination was made in the exercise of judicial power. That is obvious in the case of a determination for which no review is sought, but it is equally the case where a review is sought. The existence or exercise of a right of appeal from a decision made in the exercise of judicial power does not convert that decision into one of an administrative kind (see *Harris v. Caladine* [1991] 172 CLR 84 at p. 111 per Brennan J, at p. 141 per Toohey J).

The way in which the Commonwealth sought to use the review procedure was to say that its comprehensive nature was such as to indicate that the jurisdiction of the Federal Court was original and not by way of appeal. Because a determination might be registered and enforced without recourse to review, that argument cannot succeed in any event, but the review procedure, despite its name, does not indicate a proceeding in the original jurisdiction of the Federal Court. The Court "may" review all issues of law and fact but is not required to do so. It would be unlikely to do so in the absence of some specified ground for disturbing the Commission's determination. Moreover, upon a review a party cannot adduce new evidence without the leave of the Court. Whether "new evidence" is the same as fresh evidence is not clear, but its exclusion points to a proceeding by way of appeal an appeal by rehearing and not *de novo* (*ibid*. at pp. 124-126) - rather than a proceeding in the original jurisdiction of the Court. Thus the review procedure provided does not support the suggestion that the registration of a determination of the Commission is the commencement of a fresh proceeding in the Federal Court.

For these reasons, ss. 25ZAA, 25ZAB and 25ZAC, which combine to make a determination of the Commission binding, authoritative and enforceable, invalidly purport to invest judicial power in the Commission. Section 25ZC, which provides for financial or legal assistance in review proceedings, is dependent for its application upon s. 25ZAC and must also fail. We would answer the question asked: yes, ss. 25ZAA, 25ZAB, 25ZAC and 25ZC.